

1 THOMAS L. SANSONETTI  
Assistant Attorney General  
2 Environment and Natural Resources Division  
United States Department of Justice  
3 Washington, D.C. 20530

4 ROBERT D. MULLANEY  
Environmental Enforcement Section  
5 Environment and Natural Resources Division  
United States Department of Justice  
6 301 Howard Street, Suite 1050  
San Francisco, California 94105  
7 Telephone: (415) 744-6491

8 DANIEL G. BOGDEN  
United States Attorney  
9 BLAINE WELSH  
Assistant United States Attorney  
10 District of Nevada  
333 Las Vegas Blvd. South, Suite 5000  
11 Las Vegas, Nevada 89101  
Telephone: (702) 388-6336

12 Attorneys for Plaintiff United States of America  
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14 UNITED STATES DISTRICT COURT  
15 DISTRICT OF NEVADA

16 UNITED STATES OF AMERICA,	)	
	)	
17 Plaintiff,	)	Civil No.
	)	
18 v.	)	
	)	CONSENT DECREE
19	)	
20 J. R. SIMPLOT COMPANY,	)	
	)	
21 Defendant.	)	

22 WHEREAS, Plaintiff United States of America, on behalf of  
23 the United States Environmental Protection Agency ("EPA"), is  
24 concurrently filing a complaint (the "Complaint") initiating this  
25 action against the J. R. Simplot Company ("Simplot");

26 WHEREAS, the Complaint alleges that Simplot operated its  
27 silica sand processing facility in Overton, Nevada (the  
28 "Facility") in violation of the Nevada State Implementation Plan

1 for Clark County (the "SIP"), including the requirement to apply  
2 Best Available Control Technology ("BACT") for emissions of  
3 sulfur dioxide ("SO<sub>2</sub>"), and that the violations of the SIP are  
4 continuing;

5 WHEREAS, the SIP was approved by EPA pursuant to Section 110  
6 of the Clean Air Act (the "Act"), 42 U.S.C. § 7410;

7 WHEREAS, EPA issued a Notice of Violation in September 1999  
8 (the "NOV") with respect to the United States' allegations  
9 against Simplot;

10 WHEREAS, Simplot denies the material allegations of the NOV  
11 and of the Complaint;

12 WHEREAS, this Consent Decree does not constitute an  
13 admission by Simplot of any facts or of any liability for the  
14 matters alleged in the NOV and/or in the Complaint;

15 WHEREAS, the United States and Simplot (collectively, the  
16 "Parties") agree that settlement of the civil claims as alleged  
17 in the NOV and/or in the Complaint is in the public interest and  
18 that entry of this Consent Decree without further litigation is  
19 the most appropriate way to resolve this action;

20 NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as  
21 follows:

## 22 23 I. JURISDICTION AND PARTIES BOUND

24 1. Jurisdiction & Venue. This Court has jurisdiction over  
25 the subject matter of this action and over the Parties pursuant  
26 to section 113(b) of the Act, 42 U.S.C. § 7413(b) and 28 U.S.C.  
27 §§ 1331, 1345 and 1355. Venue is proper in this Court pursuant  
28 to 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1391(b), 1391(c) and

1 1395(a), because the violations alleged in the Complaint are  
2 alleged to have occurred in, and Simplot conducts business in,  
3 this judicial district. The Complaint states a claim upon which  
4 relief may be granted against Simplot pursuant to 42 U.S.C.  
5 § 7413(b). Notice of the commencement of this action has been  
6 given to the State of Nevada through the Clark County Department  
7 of Air Quality Management ("DAQM"). Simplot consents to and  
8 shall not challenge entry of this Consent Decree nor this Court's  
9 jurisdiction to enter, enforce, modify, or terminate this Consent  
10 Decree.

11 2. Parties Bound. This Consent Decree shall apply to, and  
12 be binding upon, Simplot and its successors and assigns, as well  
13 as on the United States on behalf of EPA.

14 a. Requirements for Transfer of the Facility. In the  
15 event that Simplot proposes, during the term of this Consent  
16 Decree, to sell or to transfer any ownership interest or right to  
17 operate the Facility, including but not limited to the sale,  
18 lease, or licensing of others to operate all or part of the  
19 Facility (hereinafter a "Facility Interest"), Simplot shall:

20 i. Prior to transferring any Facility Interest, give  
21 written notice of this Consent Decree to the  
22 proposed purchaser(s) or transferee(s), and shall  
23 concurrently submit a copy of the written  
24 notification(s) to EPA, directed to the address  
25 provided in Section IX (Notification), Paragraph  
26 12; and

27 ii. Attach a copy of this Consent Decree to any  
28 agreement by which Simplot sells or transfers any

1 Facility Interest, and include in each such  
2 agreement a provision, enforceable by the United  
3 States as a third-party beneficiary, that  
4 obligates the purchaser or transferee to perform  
5 the obligations of Simplot under this Consent  
6 Decree.

7 b. Effect of Transfer on Simplot. Transfer of any  
8 Facility Interest will not relieve Simplot from its obligations  
9 under this Consent Decree.

## 10 11 **II. CIVIL PENALTY**

12 3. Payment Requirements. Simplot shall pay a civil penalty  
13 to the United States of FIVE HUNDRED TWENTY FIVE THOUSAND DOLLARS  
14 (\$525,000), plus interest through the date of payment. Prior to  
15 the execution of this Consent Decree, on August 30, 2002, Simplot  
16 deposited the sum of \$525,000 into an escrow account it had  
17 established bearing interest at the rate of 3% per annum. Within  
18 the latter of FIFTEEN (15) days of the date of entry of this  
19 Consent Decree by the Clerk of the United States District Court  
20 for the District of Nevada (the "Effective Date"), or FIVE (5)  
21 days of receipt of the Fedwire Electronic Fund Transfer  
22 instructions described in Paragraph 6, Simplot shall provide  
23 written notice to the escrow agent instructing the escrow agent  
24 to pay the United States the full amount of the funds held in  
25 escrow (\$525,000 plus all interest accumulated from the date of  
26 commencement of escrow to the date of termination of the escrow  
27 account). Simplot shall ensure that this payment is made in  
28 accordance with the requirements of Section V (Payments under

1 this Consent Decree), Paragraph 6.

2  
3 **III. INJUNCTIVE RELIEF**

4 4. Requirements to Install, Test & Report on Emissions  
5 Controls. Simplot shall perform the injunctive relief prescribed  
6 in this Paragraph 4 to, inter alia, install controls for sulfur  
7 dioxide and particulate matter emissions at the Facility, test  
8 those controls, and report on its progress on these activities to  
9 EPA and DAQM.

10 a. Authority to Construct Permit and Operating Permit.  
11 On June 10, 2002, Simplot submitted an application for an  
12 authority to construct permit ("ATC") to DAQM to install and  
13 operate emission control equipment at the Facility under Rule  
14 15.1 of the SIP (as approved by EPA at 47 Fed. Reg. 26386 (June  
15 18, 1982)). Simplot revised that application to address the need  
16 for a baghouse to control particulate emissions and resubmitted  
17 the application to DAQM on March 14, 2003. Simplot subsequently  
18 revised and resubmitted the application to DAQM in December 2003  
19 (the "Final ATC Application"). A copy of the Final ATC  
20 Application is attached hereto as Attachment A. In the event of  
21 any conflict between the terms of this Consent Decree and those  
22 of Attachment A, the terms of this Consent Decree shall control.  
23 Unless EPA agrees in writing to relieve Simplot of the  
24 obligation, in whole or in part, of this Sub-Paragraph 4.a,  
25 Simplot agrees that it will not accept, and will appeal, an ATC  
26 issued by DAQM that does not include: (1) the permit limits  
27 proposed in the Final ATC Application, described below in Sub-  
28 Paragraph 4.a.i and (2) the mechanism proposed in the Final ATC

1 Application for establishing a permit limit on condensable  
2 particulate matter emissions, described below in Sub-Paragraph  
3 4.a.ii:

4 i. Set Permit Limits. The Final ATC Application  
5 includes the following limits for fuel, SO2 removal  
6 efficiency, SO2 emissions, maximum coal throughput  
7 rate, coal supply and filterable particulate matter  
8 emissions (the "Set Permit Limits"):

- 9 (1) Simplot shall use either coal or propane as  
10 fuel;
- 11 (2) Simplot shall remove SO2 emissions at a  
12 minimum removal efficiency of 85% when burning  
13 coal containing 0.6% or less sulfur; for coal  
14 containing greater than 0.6% sulfur, the  
15 removal efficiency shall increase so as to  
16 limit SO2 emissions to no greater than 7.34  
17 lbs/hour (when burning coal with 0.8% sulfur,  
18 for example, the SO2 removal efficiency shall  
19 be no less than 89%);
- 20 (3) Simplot shall limit SO2 emissions to a maximum  
21 of 7.34 pounds per hour;
- 22 (4) Simplot shall limit the average coal  
23 throughput rate to no more than 2.04 tons per  
24 hour on a rolling twenty-four hour basis;
- 25 (5) Simplot shall require its coal suppliers to  
26 provide coal containing a sulfur content of no  
27 greater than eight-tenths of one percent  
28 (0.8%), and shall also require its coal  
suppliers to provide Simplot with confirmation  
of the sulfur content of the coal provided to  
Simplot; and
- (6) Simplot shall limit filterable particulate  
matter emissions to no more than 0.025 gr/dscf  
(verified by EPA Reference Method 5 or  
equivalent methods approved by EPA).

ii. Permit Limit To Be Set Through Testing. The Final  
ATC Application proposes establishing a permit  
limit for condensable particulate matter based on

1 the levels determined through the Performance Test,  
2 as described in Sub-Paragraph 4.c.

3 b. Installation of Emission Control Equipment.

4 Simplot shall diligently proceed with acquiring, installing and  
5 operating the emission control equipment required by the ATC (the  
6 "Emission Control Equipment") upon receipt of the ATC. Simplot  
7 shall complete construction and installation of the Emission  
8 Control Equipment and shall begin to operate the Emission Control  
9 Equipment no later than 365 days after receipt of the ATC.

10 Within FIFTEEN (15) days of completing installation of the  
11 Emission Control Equipment, Simplot shall submit written notice  
12 of completion to DAQM, with a copy to EPA, directed to the  
13 addresses provided in Section IX (Notification), Paragraph 12.

14 c. Performance Test. The requirements of this Sub-  
15 Paragraph 4.c pertain to the test required to determine whether  
16 the emissions controls specified in the ATC (including both the  
17 Emission Control Equipment and the operation limits  
18 (collectively, the "Emissions Controls")) meet the Set Permit  
19 Limits required by Sub-Paragraph 4.a.i, as well as to establish  
20 the basis for limits on emissions of condensable particulate  
21 matter (this test is hereinafter referred to as the "Performance  
22 Test").

23 i. Proposed Test Protocol. No later than THIRTY (30)  
24 days prior to completing installation of the  
25 Emission Control Equipment, Simplot shall submit a  
26 proposed test protocol for the Performance Test  
27 (the "Performance Test Protocol") to DAQM for its  
28 approval, with a copy to EPA, directed to the

1 address provided in Section IX (Notification),  
2 Paragraph 12. The Performance Test Protocol shall  
3 require Simplot to demonstrate compliance with the  
4 Emissions Controls specified in Sub-Paragraph 4.a.i  
5 while operating at 90% of its capacity, i.e., a  
6 firing rate of at least 1.84 tons per hour of coal  
7 (containing no more than eight-tenths of one  
8 percent (0.8%) sulfur content). The Performance  
9 Test Protocol shall propose the means of measuring  
10 the coal throughput rate for the duration of the  
11 source test. The Performance Test Protocol shall  
12 also require Simplot to measure condensable  
13 particulate matter, using EPA Reference Method 202  
14 for condensable particulate matter. The  
15 Performance Test Protocol shall include the  
16 selection of sampling ports and a discussion of EPA  
17 Reference Method 1 Criteria.

18 ii. Response to Comments on Performance Test Protocol.  
19 Within FIFTEEN (15) days of receipt of DAQM's and  
20 EPA's comments on the Performance Test Protocol,  
21 Simplot shall submit a revised test protocol (the  
22 "Revised Test Protocol") to DAQM, with a copy to  
23 EPA, directed to the addresses provided in Section  
24 IX (Notification), Paragraph 12. Simplot shall  
25 incorporate changes in the Revised Test Protocol  
26 designed to satisfy all of EPA's and DAQM's  
27 comments on the Performance Test Protocol. If  
28 Simplot believes that it cannot comply with any



1 change in the Performance Test Protocol called for  
2 by any aspect of EPA's and DAQM's comments, Simplot  
3 shall provide EPA and DAQM with a detailed  
4 explanation of the reasons for its belief.

5 iii. Changes to Revised Test Protocol. If EPA  
6 notifies Simplot that its Revised Test Protocol  
7 is insufficient, Simplot shall submit a second  
8 revised test protocol (the "Third Protocol"),  
9 incorporating all of the changes requested by  
10 EPA and/or DAQM, within THIRTY (30) days of  
11 Simplot's receipt of such notification. If  
12 Simplot disputes EPA's determination that the  
13 Revised Test Protocol is insufficient, Simplot  
14 may initiate dispute resolution procedures  
15 pursuant to Section VIII (Dispute Resolution),  
16 Paragraph 10.

17 iv. Conducting Performance Test. Simplot shall conduct  
18 the Performance Test in accordance with the test  
19 protocol (the Performance Test Protocol, the  
20 Revised Protocol, or the Third Protocol) that is  
21 approved by DAQM, with the written concurrence of  
22 EPA. Simplot shall initiate the Performance Test  
23 within the later of: (a) FORTY-FIVE (45) days after  
24 receiving DAQM's approval of the test protocol, or  
25 (b) SIXTY (60) days after reaching a coal  
26 throughput rate of 1.84 tons per hour (but no later  
27 than ONE HUNDRED EIGHTY (180) days after the  
28 initial startup of the Emission Control Equipment).

1  
2 v. Performance Test Report. Within FORTY-FIVE (45)  
3 days after the completion of the Performance Test,  
4 Simplot shall provide a report describing the  
5 testing and its results to DAQM and to EPA,  
6 directed to the addresses provided in Section IX  
7 (Notification), Paragraph 12. If the Performance  
8 Test was successful in demonstrating compliance  
9 with the Set Permit Limits required by Sub-  
10 Paragraph 4.a.i, the report shall also propose  
11 limits for condensable particulate matter to be  
12 included in an operating permit issued by DAQM (the  
13 "Operating Permit") under Section 16 of the SIP (as  
14 approved by EPA at 47 Fed. Reg. 26386 (June 18,  
15 1982)) or successor provisions of the SIP, as  
16 required by Sub-Paragraph 4.a.ii.

17 vi. Performance Test Failure. If the Performance Test  
18 fails to demonstrate compliance with the Set Permit  
19 Limits required by Sub-Paragraph 4.a.i, Simplot  
20 shall submit to EPA and DAQM, at the addresses  
21 provided in Section IX (Notification), Paragraph  
22 12, proposed revisions to the Emissions Controls  
23 intended to meet the Set Permit Limits. The  
24 provisions of this Sub-Paragraph 4.c, Performance  
25 Test, shall apply upon DAQM's issuance of a revised  
26 ATC, if a revised ATC is required, or upon DAQM's  
27 issuance of a written notification that no revision  
28 to the ATC is required. If Simplot is required to

1 submit a revised ATC application to DAQM due to the  
2 failure of the Performance Test to meet the Set  
3 Permit Limits, Simplot must submit its revised ATC  
4 application to EPA and obtain EPA's written  
5 approval of the revised ATC application prior to  
6 formally submitting the application to DAQM for  
7 approval. Simplot shall include the requirements  
8 of Sub-Paragraphs 4.a.i and 4.a.ii in the revised  
9 ATC application, and agrees that it shall not  
10 accept and shall appeal an ATC that does not  
11 include those requirements, unless EPA agrees, in  
12 writing, to relieve Simplot of these obligations.

13 d. Compliance Certification. No later than FIFTEEN  
14 (15) days after submitting a source test report in accordance  
15 with Sub-Paragraph 4.c.v that demonstrates compliance with the  
16 standards required by Sub-Paragraph 4.a.i, Simplot shall submit a  
17 written certification (the "Compliance Certification") to EPA and  
18 DAQM stating that it has met these requirements, directed to the  
19 addresses provided in Section IX (Notification), Paragraph 12.

20 e. Operating Permit & Operation. Simplot shall apply  
21 for an Operating Permit from DAQM to operate the Emission Control  
22 Equipment, after obtaining EPA's written acknowledgment that the  
23 contents of the application meet the requirements of Sub-  
24 Paragraph 4.e.i.

25 i. Operating Permit Contents. In the application for  
26 the Operating Permit, Simplot shall propose  
27 incorporation of the Set Permit Limits and all  
28 other operational requirements of the ATC or, if

1 one is necessary pursuant to Sub-Paragraph 4.c.vi,  
2 the Revised ATC; an emissions limit for condensable  
3 particulate matter based on the results of the  
4 Performance Test; a provision requiring a  
5 methodology to determine the hourly SO<sub>2</sub> emission  
6 rate; and a provision requiring measurement of pH  
7 and flow rate of the scrubber liquor at least every  
8 four hours while the Facility is operating. Unless  
9 EPA agrees in writing to relieve Simplot of the  
10 obligation, in whole or in part, of this Sub-  
11 Paragraph 4.e, Simplot agrees that it will not  
12 accept, and will appeal, an Operating Permit that  
13 does not include all of the requirements of this  
14 Sub-Paragraph.

15 ii. Operation of Facility. Simplot shall operate the  
16 Facility and its equipment to comply with the  
17 requirements for the Emissions Controls specified  
18 in the Operating Permit.

19 f. Progress Reports. Simplot shall submit quarterly  
20 progress reports to EPA after issuance of the ATC and until the  
21 issuance of the Operating Permit, directed to the address  
22 provided in Section IX (Notification), Paragraph 12. The  
23 progress reports shall be postmarked by the 30th day following  
24 each calendar quarter and shall summarize the progress that  
25 Simplot has made in installing the Emission Control Equipment,  
26 conducting the Performance Test, analyzing the results of the  
27 Performance Test, and obtaining the Operating Permit, as  
28 applicable.

1           g. Performance Reports. Simplot shall submit  
2 quarterly performance reports to EPA after submission of the  
3 Compliance Certification pursuant to Sub-Paragraph 4.d and until  
4 the termination of this Consent Decree, directed to the address  
5 provided in Section IX (Notification), Paragraph 12. The  
6 performance reports shall be postmarked by the 30th day following  
7 each calendar quarter and shall state whether there was any  
8 period of operation during the quarter in which any emissions  
9 limit specified in the Operating Permit is not met. If there was  
10 any failure to meet any emissions limit, the report shall specify  
11 the magnitude of any excess emissions, any conversion factors  
12 used, the date and time of commencement and completion of each  
13 time period of excess emissions, the nature and cause of any  
14 malfunction (if known) and the corrective action taken or  
15 preventative measures adopted. If Simplot is required by DAQM to  
16 submit a quarterly report containing the information required for  
17 performance reports pursuant to this Sub-Paragraph 4.g, Simplot  
18 may submit to EPA a copy of the report submitted to DAQM in lieu  
19 of a performance report.

#### 21                           IV. STIPULATED PENALTIES

22           5. Requirement to Pay Stipulated Penalties. Simplot shall  
23 pay the following stipulated penalties for failure to comply with  
24 this Consent Decree:

25           a. Failure to Provide Timely, Accurate and Complete  
26 Notices and Reports. If Simplot fails to provide any notice or  
27 report required by this Consent Decree by the date due (excluding  
28 the notices required by Paragraphs 9 (Force Majeure) or 18

(Termination)), or if Simplot fails to provide EPA with a revised report within ten working days of receiving a written notification from EPA that the original report was incomplete, inaccurate, or missing information, Simplot shall pay a stipulated penalty for each day the report or revised report is late. The amount of the stipulated penalty for late notices or reports is as follows:

<u>Penalty per day</u>	<u>Number of days of violation</u>
\$500	first through fifteenth
\$1,000	sixteenth through thirtieth
\$1,500	each day beyond thirtieth

If Simplot disputes EPA's request for a revised report, Simplot may initiate dispute resolution procedures pursuant to Section VIII (Dispute Resolution), Paragraph 10.

b. Failure to Meet Injunctive Relief Requirements

other than Notices or Reports. Except as may be excused under Section VII (Force Majeure), Paragraph 9, Simplot shall be liable for stipulated penalties for failure to comply with the requirements of Section III (Injunctive Relief), Paragraph 4. For each day Simplot fails to comply with any requirement of Paragraph 4 (other than requirements to submit notices and reports, which are subject to Sub-Paragraph 5.a), Simplot shall pay the following stipulated penalty:

<u>Penalty per day</u>	<u>Number of days of violation</u>
\$2,500	first through fifteenth
\$5,000	sixteenth through thirtieth
\$10,000	each day beyond thirtieth

c. Failure to Make Timely Payments of Civil Penalty.

1 Simplot shall pay a stipulated penalty of \$5,000 per day for  
2 failure to timely pay the civil penalty required by Section II  
3 (Civil Penalty), Paragraph 3.

4 d. Failure to Comply with Right of Access. Simplot  
5 shall pay a stipulated penalty of \$5,000 per day for failure to  
6 comply with the requirements of Section VI (Right of Access),  
7 Paragraph 7.

8 e. Accrual. All stipulated penalties shall begin to  
9 accrue on the day after the complete performance is due or the  
10 day that a violation occurs and shall continue to accrue through  
11 the final day of the completion of the activity or the correction  
12 of the noncompliance.

13 f. Payable Upon Demand. Any stipulated penalty under  
14 this Consent Decree shall be payable upon demand and due no later  
15 than THIRTY (30) days from Simplot's receipt of EPA's written  
16 demand. Stipulated penalties shall be paid in the manner set  
17 forth in Section V (Payments Under This Consent Decree),  
18 Paragraph 6.

19 g. Interest on Late Payment. If Simplot fails to pay  
20 stipulated penalties owed pursuant to this Consent Decree within  
21 THIRTY (30) days of EPA's written demand, it shall pay interest  
22 on the late payment for each day of late payment after the  
23 initial thirty-day time period. The rate of interest shall be  
24 the most recent interest rate determined pursuant to 28 U.S.C.  
25 § 1961.

26 h. Disputes on Stipulated Penalties. If Simplot  
27 disputes its obligation to pay part or all of a stipulated  
28 penalty, its sole recourse is to initiate the dispute resolution

1 procedures under Section VIII (Dispute Resolution), Paragraph 10.  
2 If Simplot invokes dispute resolution, Simplot shall: (i) pay to  
3 the United States any amount that it does not dispute and (ii)  
4 establish an interest-bearing escrow account and deposit any  
5 disputed amount into the account no later than TWENTY (20) days  
6 of the date of EPA's written demand for the stipulated penalty.  
7 If the dispute is resolved in Simplot's favor, Simplot may  
8 retrieve the escrowed amount plus any accrued interest.  
9 Otherwise, the United States shall be entitled to the portion of  
10 the escrowed amount as determined through informal dispute  
11 resolution or determined by the Court, plus the interest accrued  
12 on such amount, and Simplot shall arrange for the disbursement of  
13 the amount payable to the United States within TWENTY (20) days  
14 of the determination resulting from the resolution of the  
15 informal dispute or that is issued by the Court. Simplot shall  
16 make this payment in the manner set forth in Section V (Payments  
17 Under This Consent Decree), Paragraph 6. Simplot may retrieve  
18 any balance in the escrow over the amount payable to the United  
19 States plus the accrued interest on that balance.

20 i. Reservation of Rights Respecting Failures to  
21 Comply. Defendant's payment of stipulated penalties under this  
22 Consent Decree shall be in addition to any other rights or  
23 remedies available to the United States by reason of Defendant's  
24 failure to comply with any requirement of this Consent Decree or  
25 of applicable law. Where a violation of this Consent Decree is  
26 also a violation of the Act, Simplot shall be allowed a credit  
27 for any Stipulated Penalties paid against any statutory penalties  
28 imposed for that violation. The United States may, in the



unreviewable exercise of its discretion, reduce or waive  
Stipulated Penalties otherwise due it under this Consent Decree.

#### **V. PAYMENTS UNDER THIS CONSENT DECREE**

6. Payment Method and Procedures. All payments under this  
Consent Decree shall be made by Fedwire Electronic Fund Transfer  
("EFT") to the U.S. Treasury according to current United States  
EFT procedures. The United States will provide a copy of current  
EFT procedures to Simplot, directed to the address provided in  
Section IX (Notification), Paragraph 12. Concurrently with  
making the EFT, Simplot shall fax notice of payment to the person  
designated as "Point of Contact" on the EFT transfer instructions  
and shall send notice of payment to EPA and the United States  
Department of Justice ("DOJ") at the addresses listed in Section  
IX (Notification), Paragraph 12. The notice of payment shall  
identify: (1) the date and amount of money transferred; (2) the  
name and address of the transferring bank; (3) this case by name;  
(4) the civil action number; (5) USAO File Number 1999V00370; (6)  
DOJ #90-5-2-1-06987; (7) this Consent Decree (including the  
Effective Date); and (8) a description of the reason for the  
payment (including the paragraph and sub-paragraph number(s) of  
this Consent Decree that are most relevant to the payment).

#### **VI. RIGHT OF ENTRY**

7. Access to Facility. Simplot shall provide EPA and its  
contractors, consultants and agents with access to enter the  
Facility at all reasonable times, upon proper presentation of  
credentials, for any of the following purposes:

1           a. to monitor the progress of activities required  
2 under this Consent Decree;

3           b. to verify any data or information submitted to the  
4 United States or DAQM in accordance with the terms of this  
5 Consent Decree;

6           c. to obtain samples and/or, upon EPA's request, to  
7 obtain splits of any samples taken by Simplot or by its agents,  
8 representatives, contractors, consultants or any other entities  
9 controlled by Simplot (collectively, "Simplot's Agents"); and

10          d. to assess Simplot's compliance with this Consent  
11 Decree, any authority to construct and/or any operating permit  
12 issued by DAQM, and/or the Clean Air Act.

13          8. Reservation of Rights Respecting Right of Entry.

14 Nothing in this Consent Decree shall be interpreted to in any way  
15 limit or otherwise negatively affect any right of entry, right of  
16 inspection, or right to obtain information held by the United  
17 States pursuant to applicable federal, state, or local laws,  
18 regulations, or permits.

19  
20                               **VII. FORCE MAJEURE**

21          9. Prevention of Timely Performance. Simplot shall satisfy  
22 the requirements of Section III (Injunctive Relief), Paragraph 4  
23 except to the extent, and for the period of time, that such  
24 performance is prevented or delayed by events that constitute a  
25 "Force Majeure," as provided in this Paragraph 9.

26          a. Definition of Force Majeure. For the purposes of  
27 this Consent Decree, a "Force Majeure" is defined as any event  
28 arising from causes beyond the control of Simplot or Simplot's

1 Agents that delays or prevents the performance of any obligation  
2 under this Consent Decree despite the Diligent and Timely Efforts  
3 of Simplot and Simplot's Agents to fulfill the obligation.

4 "Diligent and Timely Efforts" include preventing or minimizing  
5 any resulting delay to the greatest extent possible. Simplot's  
6 financial inability to perform any obligation under this Consent  
7 Decree shall not be construed to be a Force Majeure for purposes  
8 of this Consent Decree.

9           b. Notification of Force Majeure. Within 72 hours  
10 after Simplot and/or Simplot's Agents first learn(s) of an actual  
11 or potential event that may delay or prevent the performance of  
12 any obligation under this Consent Decree and that Simplot  
13 believes is a Force Majeure, Simplot shall notify the Chief, Air  
14 Enforcement Office, Air Division of EPA, Region 9, by telephone  
15 at (415) 972-3988. Simplot shall also submit a written  
16 notification to EPA within SEVEN (7) days of Simplot's knowledge  
17 of the event, directed as provided in Section IX (Notification),  
18 Paragraph 12. The written notification shall fully describe the  
19 event that Simplot believes may delay or prevent performance; the  
20 activities that may be delayed or prevented; the reasons for the  
21 delay; the reasons why Simplot believes that the delay is beyond  
22 the reasonable control of Simplot and/or Simplot's Agents; the  
23 anticipated duration of the delay; the actions Simplot has taken  
24 or intends to take to prevent or minimize the delay; a schedule  
25 for implementation of any measures Simplot intends to take to  
26 prevent or mitigate the delay and any effects of the delay; and  
27 the time needed to implement any directly delayed and/or  
28 dependent activities. EPA may, in its unreviewable discretion,

1 extend the time within which written notification must be given;  
2 however, no such extension shall be effective unless it is  
3 provided in writing.

4 c. EPA Determination. Within TEN (10) days after  
5 receiving notice from Simplot of a potential Force Majeure, EPA  
6 will provide written notification to Simplot stating whether  
7 Simplot's request for a delay is justified. If EPA agrees that a  
8 Force Majeure has or will cause a delay in any compliance  
9 requirement and that Simplot and/or Simplot's Agents could not,  
10 through the exercise of due diligence, prevent the delay, EPA's  
11 notification shall include an extension of time for performance  
12 of the compliance requirements EPA believes have been or will be  
13 delayed by the Force Majeure. EPA's failure to respond to a  
14 request for a delay shall be deemed a denial of that request. If  
15 Simplot disagrees with EPA's determination, it may initiate  
16 dispute resolution procedures pursuant to Section VIII (Dispute  
17 Resolution), Paragraph 10.

18 d. Failure to Comply with Force Majeure Procedures.  
19 Simplot's failure to comply with the Force Majeure notice  
20 requirements provided in Sub-Paragraph 9.b for any delay in  
21 performance shall be deemed an automatic forfeiture of its right  
22 to assert that the delay was caused by a Force Majeure unless:  
23 (1) such failure to provide notice was caused by a Force Majeure  
24 or (2) EPA, in writing and in its unreviewable discretion, agrees  
25 otherwise. Simplot shall be deemed to know of any circumstance  
26 that Simplot and/or Simplot's Agents knew or should have known.

27  
28 **VIII. DISPUTE RESOLUTION**

1        10. Dispute Resolution Generally. The dispute resolution  
2 procedures of this Section shall be the exclusive mechanism to  
3 resolve disputes arising under or with respect to this Consent  
4 Decree. However, the United States is not limited to the use of  
5 the procedures in this Section if it chooses to enforce  
6 obligations of Simplot's that have not been disputed in  
7 accordance with this Section.

8        11. Informal & Formal Dispute Resolution.

9            a. Informal Dispute Resolution. In order to initiate  
10 any dispute that arises under or with respect to this Consent  
11 Decree, Simplot must first send a written notice to EPA and DOJ,  
12 directed as provided in Section IX (Notification), Paragraph 12,  
13 outlining the nature of the dispute and requesting informal  
14 negotiations to resolve the dispute. Simplot will be deemed to  
15 have waived its right to invoke dispute resolution under this  
16 Section unless it submits its written notice within FOURTEEN (14)  
17 days from the date upon which the issue in dispute first arose or  
18 was first discovered, whichever is later. EPA's receipt of this  
19 written notice will initiate a period of informal negotiations,  
20 which shall not extend beyond THIRTY (30) days unless the EPA and  
21 Simplot agree otherwise.

22            b. Formal Dispute Resolution. If the informal  
23 negotiations do not resolve the dispute, the determination of EPA  
24 shall control unless Simplot invokes formal dispute resolution  
25 under this Sub-Paragraph 11.b.

26            i. In order to invoke formal dispute resolution,  
27 Simplot must send a written statement of position  
28 to the EPA and DOJ, directed as provided in Section

1 IX (Notification), Paragraph 12, within THIRTY (30)  
2 days after the termination of the informal dispute  
3 resolution. Simplot's statement of position shall  
4 include any supporting factual data, analysis,  
5 opinion, or documentation that Simplot believes EPA  
6 should consider in its determination.

7 ii. Within THIRTY (30) days after receiving Simplot's  
8 statement of position, the United States will send  
9 Simplot its own statement of position, directed as  
10 provided in Section IX (Notification), Paragraph  
11 12. EPA will maintain an administrative record of  
12 Simplot's statement of position, the United States'  
13 statement of position, and all supporting  
14 documentation and all other documents EPA takes  
15 into consideration in reviewing the matter under  
16 dispute and coming to its final determination.

17 iii. Within FIFTEEN (15) days after receiving the  
18 United States' statement of position, Simplot may  
19 send a written reply to the EPA and DOJ, directed  
20 as provided in Section IX (Notification),  
21 Paragraph 12.

22 iv. The Director of the Air Division, EPA Region IX  
23 (the "Director"), will issue a final decision  
24 resolving the matter in dispute, based on the  
25 administrative record compiled in accordance with  
26 Sub-Paragraph 11.b.ii. If the Director has not  
27 issued a decision within NINETY (90) days of EPA's  
28 receipt of the Simplot's reply, or, if Simplot

1 chose not to send a reply, within ONE HUNDRED (100)  
2 days of the United States' issuance of its  
3 statement of position, Simplot may send a written  
4 request for a decision to the EPA and DOJ, directed  
5 as provided in Section IX (Notification), Paragraph  
6 12. If the Director has not issued a decision  
7 within THIRTY (30) days of EPA's receipt of  
8 Simplot's request for a decision, Simplot's  
9 position shall be deemed to have been denied. The  
10 decision of the Director shall be binding upon  
11 Simplot, subject only to Simplot's right to seek  
12 judicial review in accordance with Sub-Paragraph  
13 11.b.v.

14 v. The decision issued by EPA under Sub-Paragraph  
15 11.b.iv, above, shall be reviewable by this Court  
16 if Simplot files a timely motion with this Court  
17 for dispute resolution. Any such motion must be  
18 filed within THIRTY (30) days after the Director  
19 issues a decision or has been deemed to have denied  
20 Simplot's position pursuant to Sub-Paragraph  
21 11.b.iv. Simplot must set the motion for hearing  
22 more than FORTY-FIVE (45) days after the date that  
23 the motion is filed. At the time that the motion  
24 is filed, the motion must be concurrently sent to  
25 DOJ and EPA by messenger or by overnight mail  
26 delivery service, directed as provided in Section  
27 IX (Notification), Paragraph 12. The United States  
28 shall have THIRTY (30) days after receipt of the

1 motion to respond to Simplot's motion. The Court's  
2 decision in any such dispute resolution proceeding  
3 shall be based on the administrative record  
4 compiled pursuant to Sub-Paragraph 11.b.ii and the  
5 Court shall uphold EPA's determination unless  
6 Simplot proves, by a preponderance of the evidence,  
7 that the determination was arbitrary and capricious  
8 or otherwise not in accordance with law.

9 c. Dispute Resolution Does Not Toll Requirements.

10 Simplot's invocation of dispute resolution procedures under this  
11 Section will not, and shall not be deemed to, extend, postpone,  
12 or affect in any way any of Simplot's obligations under this  
13 Consent Decree that are not directly in dispute, unless the  
14 United States agrees otherwise. Stipulated penalties with  
15 respect to the disputed matter shall continue to accrue without  
16 regard to the invocation of dispute resolution procedures, but  
17 payment shall be stayed pending resolution as provided in Sub-  
18 Paragraph 5.h and, if determined to be payable in whole or in  
19 part, shall be payed as provided in Sub-Paragraph 5.h.

20  
21 **IX. NOTIFICATION**

22 12. Requirements for All Notifications & Submissions. All  
23 notices and other submissions under this Consent Decree shall  
24 meet the following requirements:

25 a. Reference Information. In each notice and other  
26 submission that Simplot is required to send to EPA and/or DOJ,  
27 Simplot shall refer to this Consent Decree and the Effective Date  
28 and shall cite the case name of United States v. J. R. Simplot



1 Company, the case number, USAO #1999V00370, and DOJ #90-5-2-1-  
2 06987.

3           b. Certification Statement. In each notice and other  
4 submission that Simplot is required to send to EPA, Simplot shall  
5 include the signature and affirmation of a responsible official  
6 of Simplot, using the following certification statement:

7       I certify under penalty of law that I have examined and  
8 am familiar with the information submitted in this  
9 document and all attachments and that this document and  
10 its attachments were prepared either by me personally  
11 or under my direction or supervision in a manner  
12 designed to ensure that qualified personnel properly  
13 gathered and presented the information contained  
14 therein. I further certify, based on my personal  
15 knowledge or on inquiry of the person or persons  
16 immediately responsible for obtaining the information,  
17 that the information is true, accurate and complete. I  
18 am aware that there are significant penalties for  
19 submitting false information, including the possibility  
20 of fines and imprisonment for knowing and willful  
21 submission of a materially false statement.

22           c. Mailing Method and Address for Notices and  
23 Submissions from Simplot to EPA. Simplot shall use certified  
24 mail, express mail, or similar overnight mail delivery service  
25 with return receipt requested for notices and all other  
26 submissions it is required to send to EPA and shall address all  
27 such notices and submissions to:

28           Director, Air Division (AIR-1)  
29           U.S. Environmental Protection Agency, Region 9  
30           75 Hawthorne Street  
31           San Francisco, California 94105  
32           Attn: Charles Aldred, AIR-5

33           d. Mailing Address for U.S. Department of Justice.  
34 Simplot shall address all notices it is required to send to DOJ  
35 to:

36           Chief, Environmental Enforcement Section

1 U.S. Department of Justice  
2 Attn: DOJ# 90-5-2-1-06987 (Mullaney)  
3 301 Howard Street, Suite 1050  
4 San Francisco, California 94105

5 with a copy to:

6 Chief, Civil Division  
7 United States Attorney's Office  
8 333 Las Vegas Blvd. South, Ste. 5000  
9 Las Vegas, Nevada 89101  
10 Attn: USAO No. 1999V00370 (Welsh)

11 e. Mailing Address for Simplot. All notices required  
12 to be sent to Simplot shall be addressed to:

13 Alan Prouty  
14 Director, Environmental and Regulatory Affairs  
15 P.O. Box 27, One Capital Center  
16 999 Main Street, Suite 1300  
17 Boise, Idaho 83707

18 with a copy to:

19 Ronald N. Graves  
20 Senior Vice-President, Secretary  
21 and Chief Legal Officer  
22 P.O. Box 27, One Capital Center  
23 999 Main Street, Suite 1300  
24 Boise, Idaho 83707

25 f. Mailing Address for DAQM. All notices required to  
26 be sent to DAQM shall be addressed to:

27 Michael Lohmeyer  
28 Permit Specialist  
Clark County Department  
of Air Quality Management  
500 South Grand Central Parkway  
P.O. Box 551766  
Las Vegas, Nevada 89155

#### 29 X. MISCELLANEOUS

30 13. Settlement & Satisfaction of Civil Claims. Entry of  
31 this Consent Decree and compliance with the requirements herein

1 shall be in full settlement and satisfaction of the civil  
2 judicial claims of the United States against Simplot as alleged  
3 in the Complaint filed in this action and/or in the NOV. This  
4 Consent Decree resolves only those matters specifically alleged  
5 in the Complaint filed in this action and/or in the NOV, through  
6 the date of lodging of this Consent Decree.

7 14. Reservation of Rights Against Simplot. Except as  
8 specifically provided in Paragraph 13, the United States does not  
9 waive any rights or remedies available to it for violation by  
10 Simplot of federal or state laws or regulations. This Consent  
11 Decree shall in no way affect the United States' ability to bring  
12 future actions for any matters not specifically alleged in the  
13 Complaint filed in this action and/or in the NOV, through the  
14 date of lodging of this Consent Decree, and settled by this  
15 Consent Decree. Any information provided pursuant to this  
16 Consent Decree may be used by the United States in any proceeding  
17 to enforce the provisions of this Consent Decree and as otherwise  
18 permitted by law.

19 15. Reservation of Rights Against Third Parties. This  
20 Consent Decree does not limit or affect the rights of the United  
21 States or Simplot against any third parties (parties not  
22 specifically part of this Consent Decree), nor does it limit the  
23 rights of such third parties against Simplot. This Consent  
24 Decree shall not be construed to create any rights in, or grant  
25 any cause of action to, any person not a party to this Consent  
26 Decree.

27 16. Compliance Obligations Unaffected. This Consent Decree  
28 in no way affects Simplot's responsibilities to comply with all

1 federal, state, or local laws and regulations. This Consent  
2 Decree is not, and shall not be construed as, a permit or a  
3 modification of a permit. The United States does not, by its  
4 consent to the entry of this Consent Decree, warrant or aver in  
5 any manner that Simplot's compliance with this Consent Decree  
6 will result in compliance with the Act. Nothing in this Consent  
7 Decree is intended to relieve Simplot of any reporting  
8 obligations required by the Act, its implementing regulations, or  
9 any other federal, state or local law, regulation, permit or  
10 other requirement.

11 17. Costs & Fees. Each of the Parties shall bear its own  
12 costs and attorney's fees in this action.

13 18. Termination. This Consent Decree shall terminate  
14 according to the procedure provided in this Paragraph.

15 a. Notification of Completion of Obligations. One  
16 year after Simplot has complied with the requirements of Section  
17 III (Injunctive Relief), Paragraph 4 (including having  
18 demonstrated compliance with the standards required by Sub-  
19 Paragraph 4.a.i), Simplot shall provide a written notice to EPA,  
20 directed to the address provided in Section IX (Notification),  
21 Paragraph 12, stating that Simplot has satisfied all obligations  
22 of this Consent Decree and believes this Consent Decree can be  
23 terminated. Simplot's notice shall refer to this Paragraph 18.

24 b. EPA Determination. Within SIXTY (60) days after  
25 receiving notice from Simplot, EPA will provide Simplot with a  
26 written response, either stating EPA's agreement that this  
27 Consent Decree is terminated, or stating EPA's determination that  
28 this Consent Decree should not be terminated. If EPA fails to

1 provide written response within SIXTY (60) days after receiving  
2 written notice from Simplot or if EPA's written response states  
3 that this Consent Decree should not be terminated, Simplot may  
4 initiate dispute resolution procedures pursuant to Section VIII  
5 (Dispute Resolution), Paragraph 10.

6 19. Retention of Jurisdiction. The Court shall retain  
7 jurisdiction to resolve any disputes that arise under this  
8 Consent Decree, including any disputes pending at the time this  
9 Consent Decree is terminated.

10 20. Procedural Requirements & Withdrawal of This Consent  
11 Decree. Simplot agrees and acknowledges that final approval of  
12 this Consent Decree by the United States and entry of this  
13 Consent Decree is subject to the requirements of 28 C.F.R.  
14 Section 50.7, which provides for notice of the lodging of this  
15 Consent Decree in the Federal Register, opportunity for public  
16 comment for at least THIRTY (30) days and consideration by the  
17 United States of any comments prior to entry of this Consent  
18 Decree by the Court. The United States reserves its right to  
19 withdraw its consent to this Consent Decree based on comments  
20 received during the public notice period. Simplot consents to  
21 entry of this Consent Decree without further notice to or from  
22 the Court.

23 21. Authority of Signatories. Each undersigned  
24 representative of Simplot and of the Plaintiff, including the  
25 Assistant Attorney General for the Environment and Natural  
26 Resources Division of the Department of Justice, certifies that  
27 he or she is fully authorized by the party he or she represents  
28 to enter into the terms and conditions of this Consent Decree and

1 to execute and legally bind the party he or she represents to  
2 this Consent Decree.

3 22. Service of Process. Simplot agrees to accept service  
4 of process by mail with respect to all matters arising under or  
5 relating to this Consent Decree and to waive the formal service  
6 requirements set forth in Rule 4 of the Federal Rules of Civil  
7 Procedure and any applicable Local Rules of this Court,  
8 including, but not limited to, service of a summons.

9 23. Integration. This Consent Decree, together with its  
10 Attachment, constitutes the final, complete, and exclusive  
11 agreement and understanding among the Parties with respect to the  
12 settlement embodied in this Consent Decree, and supersedes all  
13 prior agreements and understandings, whether oral or written. No  
14 other document, nor any representation, inducement, agreement,  
15 understanding, or promise, constitutes any part, or shall be used  
16 in construing the terms, of this Consent Decree or the settlement  
17 it represents.

18 24. Modification. This Consent Decree may not be enlarged,  
19 modified, or altered unless such modifications are made in  
20 writing and approved by the Parties. If a proposed modification  
21 would constitute a material change to any term of this Consent  
22 Decree, it shall be effective only upon approval by the Court.

23 25. Counterparts. This Consent Decree may be executed and  
24 delivered in any number of counterparts, each of which, when  
25 executed and delivered, shall be deemed to be an original, but  
26 the counterparts shall together constitute one and the same  
27 document.

28 26. Section and Paragraph Headings. The section,

1 paragraph and sub-paragraph headings set forth in this Consent  
2 Decree are included for convenience of reference only, and are  
3 not intended to supersede any other provisions of this Consent  
4 Decree. In the event of any conflict between any headings and  
5 any terms contained in the body of this Consent Decree, the  
6 headings presenting the conflict are to be disregarded.

7 27. Final Judgment. Upon entry by this Court, this Consent  
8 Decree shall constitute a final judgment for purposes of Fed. R.  
9 Civ. P. 54 and 58.

10 **ORDER**

11 IT IS SO ORDERED:

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14 \_\_\_\_\_  
15 United States District Judge

16 DATED: \_\_\_\_\_  
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1 For the Plaintiff United States of America:

2 THOMAS L. SANSONETTI  
3 Assistant Attorney General  
4 Environment and Natural Resources Division

5 Dated: 1/14/04

6  
7  
8 W. BENJAMIN FISHEROW  
9 Deputy Chief  
10 Environmental Enforcement Section  
11 Environment and Natural Resources Division  
12 U.S. Department of Justice

13 Dated: \_\_\_\_\_

14  
15 ROBERT D. MULLANEY  
16 Trial Attorney  
17 Environmental Enforcement Section  
18 Environment and Natural Resources Division  
19 U.S. Department of Justice

20  
21 DANIEL G. BOGDEN  
22 United States Attorney

23 Dated: \_\_\_\_\_

24 By:

25 BLAINE T. WELSH  
26 Assistant United States Attorney  
27 District of Nevada  
28



1 Dated: \_\_\_\_\_

2  
3 \_\_\_\_\_  
4 JOHN PETER SUAREZ  
5 Assistant Administrator  
6 for Enforcement  
7 U.S. Environmental Protection Agency

8  
9 Dated: \_\_\_\_\_

10 \_\_\_\_\_  
11 WAYNE NASTRI  
12 Regional Administrator  
13 U.S. Environmental Protection  
14 Agency, Region 9

15 OF COUNSEL:

16 ARTHUR L. HAUBENSTOCK  
17 Assistant Regional Counsel  
18 U.S. Environmental Protection  
19 Agency, Region 9  
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26  
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1 For Defendant J. R. Simplot Company:  
2

3 Dated: 12-23, 2003  
4

~~RONALD N. GRAVES~~  
5 SENIOR VICE-PRESIDENT, SECRETARY AND  
6 CHIEF LEGAL OFFICER  
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